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Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

-and-

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER INTERTANKO

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> *"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1, 278 (1824).

I. THE CONSTITUTIONAL ISSUES BEFORE THE COURT ARE CONFINED TO THE VALIDITY OF WASHINGTON STATE REGULATION OF THE PRIMARY CONDUCT OF TANK VESSELS SERVING THE INTERSTATE AND FOREIGN COMMERCE OF THE UNITED STATES IN SUBJECT MATTERS ADDRESSING THE OPERATIONS, EQUIPMENT, MAINTENANCE, PERSONNEL QUALIFICATIONS, AND MANNING OF THOSE VESSELS.

Petitioners Intertanko and the United States of America here seek reversal of a Ninth Circuit Court of Appeals decision authorized entry by a state government into the previously exclusive federal domain of tank vessel "design, construction, alteration, maintenance, operation, equipping, personnel qualification, and manning." Ports and Waterways Safety Act ("PWSA"), as codified and amended at 46 U.S.C. 3703(a).[1] *See* Pet. App., App. A, at 1a. The questions presented, while of profound constitutional import, are far narrower than suggested by the response briefs of the State of Washington ("the State") and its supporters.

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1. Intertanko's references to the PWSA, unless otherwise indicated, include amendments or additions to that Act as codified at Chapter 37 of Title 46 of the United States Code, including amendments effected by the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978).

The State and its supporters offer stark dichotomies that do not exist.[2] The alternatives presented the Court in this litigation are not a choice between effective regulation of tank vessel safety and the absence of such regulation. This litigation, accurately presented, does not compel the Court to evaluate which of two regulatory regimes it deems most effective at meeting the universally valued policy objective of protecting the marine environment through promoting the safe operations

2. Amicus States and the Prince William Sound Regional Citizens' Advisory Council ("RCAC") express concern that the field preemption positions advocated by Intertanko and the United States would inhibit or prevent States and other local entities from asserting rights to enforce federal standards, from incorporating federal regulations into state law and prevent States from imposing additional standards in areas regulated by the federal government. *See e.g.*, States' *Amicus* Br. at 11–12 and RCAC Brief at 11. The presence on the brief of non-littoral states such as Utah and Nevada suggests that this concern is generic, and not confined to the PWSA subject matters raised here. Intertanko is not advocating a ban on cooperative federal/state programs. The validity of such programs depends on the coverage of the underlying federal statute and the intent of Congress with regard to state action. Many of the examples cited by the Amicus States and the RCAC are clearly matters affecting cooperation at the junction of state and federal regulatory regimes, as, for example, where state-regulated shore-side terminals meet federally regulated vessels at the terminal facility loading dock. The California programs described at nn. 8, 11-14 appear to fall within this quite distinct category that is not directly implicated by Intertanko's argument that States may not regulate within Title II PWSA subject matters of tank vessel design, construction, alteration, repair, maintenance, equipping, personnel qualifications and manning. States *Amicus* Br. at 6 and 13. Nonetheless, to be clear, where the subject matters of state regulation fall within the field defined by these elements of section 3703(a) of Title 46 U.S.C., it is indeed Intertanko's position that duplicative regulation by the States, even where purporting to adopt the same standards, is constitutionally forbidden. State or local programs that affect vessel secondary activity in matters outside the coverage of preemptive federal statutes would have to be evaluated on conflict preemption principles. That circumstance is not presented here.

of tank vessels.[3] The question is, rather, whether and by what authority a pervasive, comprehensive, technically complex federal vessel safety and marine environmental protection regime governing the primary on-board conduct of U.S. and foreign vessels can be displaced by unilateral local action when those vessels are operating in or destined to operate in that portion of the navigable waters of the United States that are within three miles of shoreline of the State of Washington.[4] Put

3. Respondent and *amici* briefs invite an assumption that the State of Washington has constructed a better marine safety and environmental safety regime than has the federal government. Intertanko views the federal regime, and the international controls it subsumes, to be far superior to disparate state regimes for protecting ships, crews and the marine environment. This divergence of views is one best checked at the door of the federal judiciary and politely acknowledged to be the sort of matter on which reasonable stewards of the marine environment can, in all good faith, differ. The questions presented to the federal courts by the State of Washington's efforts to impose a vessel safety regime that departs the federal system are ones concerning constitutional authority at different levels of government within the federal system. The courts and the parties are poorly served if the judiciary is importuned to render fundamental constitutional decisions based on federal judges' subjective views of the merits of competing regulatory regimes.

4. The State obliquely acknowledges in its brief that many of the challenged Best Achievable Protection ("BAP") regulations apply to owners and operators outside the State of Washington: "A number of Washington's requirements are performed in or near Washington waters." State Br. at 6 and n.7; and "A second category of spill prevention requirements protect Washington waters, but do not necessarily involve operations performed exclusively in Washington waters." State Br. at 7-8 and n.8. Intertanko has contended from the district court complaint onward that many of the challenged BAP regulations are invalid because of their extraterritorial application to vessels and persons. The State in these quoted formulations appears to acknowledge this objection. As noted in affidavits submitted to the district court, vessel owners cannot segregate vessels and crews for Washington State operations. Frequently vessels commence voyages with only general notions of the ultimate destination of a vessel. In any event, vessels must be configured to trade over a wide range of ports and regions. Thus disparate requirements cumulatively burden the operations of the vessel.

more simply, the questions presented by the United States and by Intertanko in their Briefs on the merits can be fairly condensed to two words: "Who decides?" Is the federal judgment that a vessel is safe to navigate the waters of the United States "supreme" in the State of Washington? Intertanko submits that the answer here must be the answer of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978): "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Ray*, 435 U.S. at 165.[5]

A. Many of the Arguments or Concerns Raised by the State of Washington and Its Supporters Are Undisputed and Are Irrelevant to the Constitutional Issues Raised

The State and its supporters raise a number of concerns that relate to fisheries, tourism, aesthetics, economics and state involvement in such non-vessel activities as shore-side terminal operations. These points are rhetorically attractive, but are neither contested nor relevant to the correct disposition of the constitutional issues raised by Intertanko and the United States. They have been put forward by the State, Respondent-Intervenors and supporting *amici* either to divert the Court's attention from the constitutional issues that have been raised by Intertanko and the United States or because of a profound misunderstanding of the nature of the litigation.[6]

5. Although not directly cited by the parties, the United States has directed our attention to an oversight in omitting the district court complaint in this action from inclusion in the Joint Appendix. For convenience of reference by the Court, we submit as an appendix to this brief a copy of the text of that complaint.

6. There is no dispute (other than relevance) in this litigation that marine oil spills can be commercially and environmentally devastating for all concerned; that prevention of such spills is a valid societal goal for all maritime nations; that advancements in marine oil spill prevention measures are desirable; that effective governmental regulation of tank vessels is essential to protecting the safety of the vessels, their crews, and the marine environment; that human error is a factor in many marine

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The briefs of the State, Respondent-Intervenors and like-minded *amici* also assume, wrongly, that local viewpoints, some passionately believed, necessarily render local judgments superior to those of the national government in the domain of vessel safety and marine environmental protection — areas expressly identified by Congress as the controlling reasons behind federal statutes here at issue. Although the State and Respondent-Intervenors have offered strongly-held defenses of the value of Washington State's marine safety regime, they do not point to any particular defect of the federal system that the State attempted to redress at the time the BAP rules were formulated.[7]

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casualties; that the waters, islands and shoreline of Puget Sound are a priceless national treasure of enormous aesthetic and ecological bounty; that the *Exxon Valdez* accident was a needless, preventable tragedy caused by human failures; that creatures that dwell in the coastal areas of our maritime states merit, as a matter of ethical, moral and civic duty, the highest degree of protection and stewardship against intentional and careless depredations by humanity; that the depleted condition of the nation's fisheries, whether due to overfishing or to man-made insults to the ecosystem, should be a matter of both local and national concern; that hard-working citizens in coastal communities throughout the nation are vulnerable to damage to the littoral environment of the United States; that cooperation between federal, state and local authorities is a desirable circumstance that should be encouraged (within constitutional limits) and not frustrated; and that the Congress of the United States has, in specific circumstances not present here, expressly contemplated involvement by the individual states in matters that, absent federal agency agreement or express Congressional direction, would be exclusively federal.

7. The State does not directly argue that it is acting in gaps or voids in the federal regulatory structure. State Br. at 7-8 (admitting that some BAP requirements "mirror Coast Guard requirements, while others add on to existing Coast Guard requirements"); and at 12 and 31-32 (arguing that State is not attempting to "control ships," but directing "its regulations at owners and operators to avoid conflict with the operative provisions of international law."). Affidavits prepared for the district court by defenders of the State regime are essentially post hoc,

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The assertion of a power to displace the federal government in an area that indisputably controls instrumentalities of interstate and foreign commerce and the relations of the United States with foreign powers is reminiscent of regional tensions in this country during the early Nineteenth Century. Although no doubt put forward with sincere confidence that local environmental concerns inspire wisdom superior to the wisdom generated by national environmental concerns, this doctrine has a clearly demonstrated historic toxicity. When, in 1830, vigorous advocates of local interests bridled against the federal role in the disposition of public lands, Daniel Webster took the floor of the Senate to describe the fate of federal authority as existing ". . . in every state but as a poor dependent on state permission. It must borrow leave to be, and it will be no longer than state pleasure or state discretion sees fit to grant the indulgence to prolong its poor existence."[8]

Federal law of indisputable constitutional validity is under the same attack from the State of Washington and its allies as were the functions of the federal land offices in the early Nineteenth Century. The local supremacy arguments that Daniel Webster denounced are indistinguishable in their philosophical underpinnings from those advanced by the State here. Though the subjects are different — tariffs and public lands in the early 1800s, vessel regulation now — the constitutional defects are the same. The correct response and disposition of this matter is necessarily that which Webster advanced. In matters of national significance clearly vouchsafed to the national government by the Framers, the national will must prevail over centrifugal local inclinations.

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litigation-inspired justifications of the State regime. Examination of the contemporary rulemaking record of the State's BAP regulations reveals that they were conceived of as general safety requirements promulgated without any articulated link to specific passages or waterways within Puget Sound or, for that matter, within the State of Washington. JA-129 to JA-132.

8. Recounted at WILLIAM SAFIRE, LEND ME YOUR EARS 251 (W.W. Norton, ed. 1992).

II. INTERTANKO, THE UNITED STATES AND SUPPORTING *AMICI* HAVE DESCRIBED MULTIPLE CONSTITUTIONAL AND STATUTORY SOURCES OF PREEMPTION. THE RATIONALE OF *RAY v. ARCO* CONTROLS DISPOSITION HERE.

The challenged incursions by the State of Washington into federally regulated subject matters of vessel safety and marine environmental protection are stark and uncomplicated. The narrow field which Intertanko argues is overwhelmingly preemptive is tank vessel operations, equipment, personnel qualifications and manning as enumerated in Title II PWSA and, if deemed applicable here, the "reporting and operating requirements" of Title I of PWSA. *See* 33 U.S.C. § 1221 *et seq.* (as amended); and Pet. App., App. E. at 98a-113a.[9]

9. Intertanko contends that all the challenged State vessel regulations collide with subject matters of the mandatory Title II PWSA (*see* 46 U.S.C. § 3703(a)) and are thus unsustainable because of the preemptive nature of these mandatory federal programs, standards and requirements. There appears to be some sentiment, even within the position of the United States, that certain of the Washington state regulations partake of Title I PWSA elements. For example, the State does, to be sure, contend that some of its rules are "operational requirements," *see* State Br. at 37-48, similar to the tug escort provisions that were upheld in *Ray*. *See* State Br. at 36; and *Ray*, 435 U.S. at 171-73. This distinction is no consequence to the position of Intertanko. Title II PWSA subject matters (tank vessel "design, construction, alteration, repair, maintenance, operations, equipping, personnel qualification and manning") are exclusively federal in their nature while Title I subject matters ("vessel traffic services and systems in ports, harbors or congested areas or when conditions are hazardous, weather conditions or reduced visibility warrant, anchoring or mooring, concerning explosive or other dangerous substances, waterfront safety zones and establishing minimum safety requirements against accidents and structures") leave room for state action only if the federal government has not acted to assert its authority. *See Ray*, 435 U.S. at 171-72. Thus, State regulations that address vessel "operations," as that term is used in Title II PWSA, or State regulations that address tank vessel "operating requirements," as that term is used in Title I PWSA,

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Ray's preemption conclusion with regard to Title II PWSA was based on the statutory structure of the PWSA in that Congress had mandated: a) that the Secretary of Transportation promulgate rules governing the design, construction and operation of tankers; (b) that state governments and others be consulted in the development of these rules; and (c) that a system of certifications and inspections should govern compliance and serve as permits for vessel operations. These factors, coupled with clear legislative history endorsing uniform national standards led to the Court's view that the challenged State design and construction laws were subject to field preemption. *Ray*, 435 U.S. at 161-163. The pervasiveness of this vessel safety regime, much expanded in intervening years since *Ray*, leads to confidence in federal intent to preempt because the activity of tank vessels is subject to federal permission, inspections by federal personnel and subject to federal commands. *City of Burbank v. Lockheed Air Terminals, Inc.*, 411 U.S. 624, 634 (1973). These factors apply no differently to the remaining elements of Title II PWSA than they do to vessel design and construction.[10]

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are here equally unsustainable under established preemption principles, given that federal action has occupied even the Title I fields that might be argued to coincide with certain of the BAP Regulations.

10. The State's efforts to cast doubt on the field preemptive effect of Title II PWSA, include reference to the Court's preservation of the State's requirement that non-U.S. flag vessels carry a state pilot. The State passes off this unremarkable element of Ray as addressing a "manning" requirement of the sort that would normally be governed by Title II PWSA and then argues that its preservation establishes that all Title II subject matters are not part of the preempted field found for the design, construction and equipment elements of *Ray*. State Br. at 21. The Court could not have done otherwise given the nearly two hundred year federal statutory grant of authority to the states to require state pilots for certain vessels. The Court's disposition of this issue is clearly based on an express federal dispensation granted the states and had no relationship to the Title II PWSA subject matters that compel a preemptive finding in this litigation.

III. TRADITIONAL STATE AND LOCAL POWERS OF THE POLICE DO NOT APPLY TO REGULATION OF INTERSTATE AND INTERNATIONAL VESSEL EQUIPMENT, MAINTENANCE, OPERATIONS, PERSONNEL QUALIFICATIONS AND MANNING ISSUES. THESE ARE ON-BOARD, PRIMARY CONDUCT MATTERS THAT ARE THE TRADITIONAL, EXCLUSIVE PRESERVE OF FEDERAL AUTHORITIES.

A dominant theme of the briefs of the State, Respondent-Intervenor, and their *amicus* supporters is the assumption that federal regulation of tank vessels acts here to compromise valid powers of the police when states elect to enter this regulatory field. Whatever merit there may be to the general proposition that "the historic police powers of the states were not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress,"[11] no such police powers are at issue here. The resort to this defense here is "simply invoking the convenient apologetics of the police power." *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 780 (1945) (citations omitted).

The State, by invoking a police powers defense of its actions, grasps at two themes that run through much of the Court's preemption jurisprudence.[12] The first is the oft-cited

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11. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). State Br. at 13.

12. The *Amicus* Brief of the National Association of Waterfront Employers and Signal Mutual Indemnity Association, Ltd. discusses distinctions between Commerce Clause preemption jurisprudence decisions and decisions based primarily on the Admiralty Clause. *See* Waterfront Employers *Amicus* Br. at 14-17. They correctly submit that the analysis under the two clauses is fundamentally different and recite that no presumption of validity, under police powers or otherwise, has been extended by the courts to state laws that impinge on Admiralty Clause subject matters. Waterfront Employers *Amicus* Br. at 27. Intertanko has argued that the Admiralty Clause, U.S. Const. Art. III, (Cont'd)

presumption against preemption phraseology of *Medtronic*, quoted above. The second is language set out in the line of cases defined by *Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); and *Ray, supra*. These three cases contain language that appears to leave some limited room for state regulation of federally-licensed vessels if the state action constitutes "reasonable, nondiscriminatory conservation and environmental protection *measures otherwise in their police powers*." *Douglas*, 431 U.S. at 277 (citing *Huron*, 362 U.S. at 447); and *Ray*, 435 U.S. at 164 (quoting *Douglas*) (emphasis supplied). Like the oft-stated presumption against displacement of police powers that runs from *Rice v. Santa Fe Elevator Corp.* through *Medtronic v. Lohr*, the language expressing solicitude for "reasonable, non-discriminatory conservation and environmental protection measures" assumes that a valid use of police powers underlies the challenged state regulation.[13]

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§ 2, is part of the several indicators of clear intent of the Framers to place matters maritime within the realm of legitimate federal authority that must overcome state actions in maritime fields. Intertanko, however, has relied, because of the clear guidance of *Ray* and the significant expansion of the scope of federal safety and environmental programs since *Ray*, primarily on the direct application of Supremacy Clause principles to the considerable body of federal statutory and administrative law that has matured since *Ray* was decided. This reliance was intended to provide the shortest route to a preemption decision on summary judgment in the district court, but should not be taken to devalue the power of Admiralty Clause arguments advanced by *amici*.

13. The State appears to disclaim an "authority or ability" to bar vessels from Washington State waters. State Br., n.5. Intertanko does not know whether these statements before this Court are recognitions of constitutional limitations on State action or are, instead, simply statements that the State of Washington lacks the resources and ability to apply coercive measures to vessels that fail to comply with its requirements. Whatever the import of these statements, they cannot save the State regulations from constitutional scrutiny. The statements, however, may be significant for the State's claim that these vessel rules

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Intertanko strongly disputes that the states have ever possessed the authority to regulate the on-board appurtenances, operations, conduct, or qualifications of vessels and their crews.[14] After nearly five years of this litigation, the State of Washington has offered no examples to change Intertanko's conclusion that on-board vessel safety has been exclusively federal.[15] From *Gibbons v. Ogden* forward,[16] state efforts to regulate vessel-related subject matters have succeeded primarily

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lie within traditional police powers of the State. These apparent concessions, whatever their intended meaning, cannot be reconciled with the persistent claim that the State is exercising legitimate powers of the police over tank vessels subject to the regulations. If traditional police powers were at work here, the State would be in no position to disclaim, even for tactical reasons, the coercive authority that must accompany its police powers.

14. The 1973 decision of this Court in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) is cited by the respondent camp for its statement that "sea-to-shore pollution [is] historically within the reach of the police power of the States . . ." *See Br. of Amici California, Alaska et al.* at 1. *Askew* interpreted section 1161(o) of the federal Water Quality Improvement Act (84 Stat. 91) to permit the State of Florida to provide for additional liability quanta for clean-up costs and damages from spills. 411 U.S. at 329-330. The case is predominantly a remedies decision. It addressed State remedies governing "damages to the shore or shore facilities [that] were not cognizable in admiralty." 411 U.S. at 340. The "sea-to-shore pollution" deemed to be in "the reach" of state police powers for purposes of its *Askew* analysis is not presented by the facts of this case. Here the State asserts authority to regulate the primary conduct of vessels operating routinely, without reference to shore damage caused by a pollution incident. Intertanko does not contest the authority of the states to fashion remedies for pollution incidents.

15. Cases cited by the State at pages 14 and 15 of its brief are consistent with Intertanko's position that state regulation has been countenanced only at the periphery, and never at the heart of federal marine safety subject matters.

16. 9 Wheaton (22 U.S.) 1 (1824).

where there was no federal presence.[17] These limited permissions of state action have always partaken of voids in the federal system or have reflected that the state, while at times regulating at conceptually close quarters to the vessel itself was, in fact either providing a remedy, *see Askew*, 411 U.S. at 341, or was regulating secondary conduct away from the vessel itself. *See Huron*, 362 U.S. at 447. A final qualification that defeats all dependence by the State on the "*Huron/Douglas*" language quoted above, is this Court's subsequent statement in *Ray* that in none of the cases upholding state conservation and environmental protection measures did the challenged state law address the same object as the federal law said to be the source of preemptive effect. *Ray*, 435 U.S. at 164, 168;[18] *see also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 106-

17. *See Kelly v. State of Washington ex. rel. Foss Co., Inc.*, 302 U.S. 1 (1937); and *Huron, supra*. The State of Washington vessel inspection program tolerated in *Kelly* addressed motor driven vessels not subject to federal controls over steam driven tugs. *Id.* at 5-8. The State law there at issue also expressly excepted from its application vessels that had been federally inspected. *Id.* at 14-15. The Court warned that

> If, however, the state goes farther and attempts to impose particular standards as to structure, design, equipment, and operation, which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.

Kelly, 302 U.S. at 15.

18. Language reflecting the sensitivity of the Court to state authority sometimes appears in cases where the Court finds preemption in any event. *See, e.g., Douglas*, 431 U.S. 265 (Virginia limitations on menhaden fishing by non-residents set aside as preempted by federal vessel documentation statute); and *Ray*, 435 U.S. 151 (Washington State vessel requirements governing tank vessel construction, design and equipment preempted by the Ports and Waterways Safety Act). This solicitude is appropriate and essential, but has no application in fields such as this where pervasive federal regulations regulating the same objects for the same purposes are in place and operational.

107 (1992) (plurality opinion) (stating focus of preemption analysis is not purpose of act, but effect on federal regulation). Here, each of the challenged Washington State regulations falls squarely within categories of federal regulatory activity fully occupied by the federal government. *See* Pet. App., App. K at 349a-353a; and U.S. Brief, App. 1a-17a.[19] The complete congruence of subject matters and objects regulated by federal and State of Washington regulations (vessel operations, equipment, personnel qualifications and training) is the critical element of this case that distinguishes it from *Huron*, *Douglas*, and *Kelly v. State of Washington ex. rel. Foss Co., Inc*, 302 U.S. 1 (1937).[20] That some of these regulations are "local" in the

19. The State refers to its fixed interval requirement, requiring tankers to record their positions every fifteen minutes, as valid because, when the Coast Guard determined that designating a particular interval "would not be practicable in all navigable waters," it did not conclude that the requirement "is not practicable in Puget Sound." State Br. at 37. In a OMS Memorandum dated December 1, 1994, the Hearing Examiner's Report stated that, with respect to the 15 minute positioning requirement, "the rules have defined 'frequently' [used in international standards] for Washington State." JA-130. Under either rationale, Washington State does not have the authority to define that which the federal government has determined is not practicable to specify in U.S. navigable waters. The State now appears to be suggesting that for a federal regulation to have preemptive effect with regard to Washington State, it must be Puget Sound-specific. The havoc that such a requirement would create for uniform national vessel standards is obvious.

20. The PWSA authorizes the Secretary of Transportation to compel compliance of the "owner, master, or person in charge of any vessel subject to the provisions of this section." *See* PWSA of 1972, Pub. L. No. 92-340, Title II, § 201(ii), 86 Stat. 424 (codified as amended at 46 U.S.C. § 9101) (1972) (enacting penalties for violations by the "owner, master, or person in charge"). The State, seeking to evade the implications of the coincidence of its BAP Regulations with the subject matters and objects of federal law argues that it "has disclaimed power to 'control ships' " but instead "directs its regulation at owners and operators." State Br. at 12 and 31-32. This distinction is of no significance to the preemption analysis required here. Federal standards apply to the vessel, its owners and operators. *See* PWSA, *supra*.

sense that they are Washington State-specific may have bearing on the determination as to whether they are measured against Title I or Title II of PWSA for preemption purposes, but does not either validate the application of a police powers claim or render the challenged rules valid under the *Huron/Douglas/Ray* recognition of potentially valid state rules.[21]

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21. The Respondents and *amici* devote a significant portion of their briefs to a description of the ecosystem and navigation of the local waters of Puget Sound. Federal law regulating vessel design, construction, operations, manning, training, equipment and safety is versatile and flexible enough to protect local variations in waterways. Federal programs thus reflect local concerns, often more specifically than does the challenged State regime. Coast Guard regulations contain specific provisions addressing particular areas, such as: vessel traffic service areas and operating requirements in New York, Louisville, Houston/Galveston, Berwick Bay, St. Mary's River, San Francisco, Puget Sound and the Juan de Fuca region, and Prince William Sound (33 C.F.R. pt. 161); special operating regulations for over 40 U.S. waterways (33 C.F.R. pt. 162); regulated navigation and limited access areas for over 90 geographic regions (33 C.F.R. pt. 165); shipping safety fairways for the Atlantic Coast, Gulf of Mexico, Alaska and California (33 C.F.R. pt. 166); traffic separation schemes and precautionary areas for New York, Chesapeake Bay, and Galveston Bay (33 C.F.R. pt. 167); escort requirements for tankers in Prince William Sound and Puget Sound (33 C.F.R. pt. 168); safety zones around 15 platforms on the outer continental shelf (33 C.F.R. pt. 147); the establishment of almost 160 anchorage areas and grounds (33 C.F.R. pt. 110); and regulating the operation of approximately 450 drawbridges (33 C.F.R. pt. 117). OPA 90 itself addresses area specific requirements. (OPA 90 sections 3002 and 4108 (the Great Lakes); section 3003 (Lake Champlain); sections 3005 and 4116(c) (Puget Sound); sections 4116(a) and 4116(c), and Title V (Prince William Sound); section 6003 (the Outer Banks of North Carolina); and Title VIII (Alaska).

IV. SECTION 1018 OF THE OIL POLLUTION ACT OF 1990, BY ITS CLEAR LANGUAGE, AND ITS RELATIONSHIP TO OTHER FEDERAL STATUTES AND OTHER PROVISIONS OF OPA, IS CONFINED TO FEDERAL PERMISSION TO THE STATES AND LOCAL GOVERNMENTS TO IMPOSE LIABILITIES, PENALTIES AND REQUIREMENTS RELATED TO DISCHARGES OF OIL.

The Court of Appeals relied heavily on section 1018 of the Oil Pollution Act of 1990 (33 U.S.C. § 2718) to conclude that Congress had authorized intervention by states or political subdivisions thereof into the subject matters occupied by the federal government's vessel safety and environmental protection regime. Pet. App., App. A at 22a-24a, 34a. The State and Respondent-Intervenors understandably echo that reliance in their response briefs. *See* State Br. at 24-29; and Respondent-Intervenors Br. at 30-36. Respondent-Intervenors also argue that both Intertanko and the United States have "abandoned their earlier interpretations" of section 1018's import. Respondent-Intervenors Br. at 31. This is not the case. Intertanko has been consistent throughout this litigation in describing section 1018 of OPA 90 to be a savings provision, the extent of which was to preserve the *status quo ante* that governed federal/state relationships in the field of liability, financial responsibility requirements and penalties prior to the enactment of OPA 90.

A. Section 1018 of OPA Is a Liability and Compensation Savings Provision That Has No Impact on the Constitutional Issues Raised by the State of Washington's Incursions Into Federal Vessel Safety and Environmental Protection Subject Matters

Section 1018 left complex but generally complementary state/federal/local relationships with regard to liability, financial responsibility and penalties very much where they had been since the enactment of the Water Quality Improvement Act of

1970 ("WQIA").[22] OPA 90 consolidated a number of pre-existing oil spill liability provisions, all of which evolved from (as did OPA section 1018 itself) the initial formulation of section 1161(o) of the WQIA.[23] The consistent meaning, intent and interpretation of these statutes, all of which have contexts well beyond vessel source pollution on navigable waters, was to leave to states and localities discretion in fashioning the remedies or punishments that apply to pollution incidents. The matter was extensively briefed before the lower courts and is discussed in detail in Judge Graber's dissent to the Court of Appeals' denial of rehearing *en banc*. Pet. App., App. C at 78a-88a. A succinct summary of the many weaknesses of the State's use of section 1018 is presented in the *Amici* International Chamber of Shipping et al. at pages 4-6 of their *amicus* brief.

Respondents advocate an open-ended interpretation of section 1018's "requirements" language.[24] "Requirements"

22. Pub. L. No. 91-224, 84 Stat. 91 (1970). Section 1161(o) of WQIA stated that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such State." *Id.* (quoted in *Askew v. American Waterways Operators*, 411 U.S. 325, 329 (1973) (emphasis in original)). *See* discussion of relation of *Askew* to the State's police powers argument at note 9, *supra*.

23. *See*, Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9614(a), ("additional liability or requirements"); the Deepwater Ports Act, 33 U.S.C. § 1517(k)(i), repealed by OPA 90 ("additional requirements or liability")); the Outer Continental Lands Act, 43 U.S.C. § 1820(c), repealed by OPA 90 ("additional requirements or liability"); the Trans-Alaska Pipeline Act, 43 U.S.C. § 1653(c)(9), repealed by OPA 90 ("additional requirements"); and the Federal Water Pollution Control Act, 33 U.S.C. § 1321(o)(2), amended by OPA 90 ("any requirements or liabilities").

24. Respondent-Intervenors Br., nn.24-26. The State is somewhat more restrained than Respondent-Intervenors. It is clear, however, that the State's position requires, implicitly, that the word "requirements" be given broad meaning outside the liability and compensation subject (Cont'd)

draws its meaning from the liability, compensation and penalties ambience of surrounding language. An axiom of statutory construction is that a word is known by the company it keeps ("*noscitur a sociis*"). This maxim is "wisely applied where a word [or phrase] is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Thus, the term "requirements," which both the State and Intervenors isolate from the contextual language of OPA Title I and section 1018, cannot be commandeered and amplified to cover a variety of subjects well beyond "liability and requirements" relating to discharges and substantial threats of discharges.[25]

Respondent-Intervenors also theorize that the term "substantial threat of a discharge" in section 1018(c) expands, rather than preserves, state authority. Respondent-Intervenors Br. at 32 and n.24. Section 1018(c) deals with the ability of federal (hence the reference to "United States"), state and local governments to penalize or impose punitive liability on a responsible party for an incident, whether or not a spill into

(Cont'd)
matters of Title I of OPA. *See* State Br. at 25-29. Subsections (a) and (c) of section 1018 speak solely of "liability" and "requirements" as those two words relate to either "discharge of oil" or "removal activities in connection with such a discharge" (subsection (a)) or the "substantial threat of discharge" (subsection (c)). Intertanko's Opening Brief noted that "discharge" and "substantial threat of discharge" are defined terms that have specific meanings. *See* Intertanko Br. at 46.

25. The immediate neighbors of section 1018 also use "requirements" as a term with financial connotations. Section 1016, under the heading "Financial Responsibility" has as its first subheading the term "Requirement." *See* 33 U.S.C. § 2716(a). Section 1016(e), "Methods of Financial Responsibility," uses the phrase "In promulgating *requirements* under this section . . ." *See* 33 U.S.C. § 2716(e) (emphasis added). Section 1019, entitled "State Financial Responsibility" makes clear that "A State may enforce on the navigable waters of the State the *requirements* for evidence of financial responsibility under section 1016." 33 U.S.C. § 2719 (emphasis added). "Requirements" is thus consistently used in Title I of OPA to connote financial responsibility requirements as they relate to liability and compensation for an incident.

navigable waters actually occurs. The "substantial threat" language of section 1018(c) predates OPA 90. Congress added "substantial threat" to 33 U.S.C. § 1321 in 1977. *See* Pub. L. No. 95-217, § 58(b) (1977), *reprinted in* 1977 U.S.C.C.A.N. 1566, 1594. The purpose was to "authorize the use of the contingency funds for protection against threatened discharges." H.R. Rep. No. 95-139, 95th Cong., 1st Sess. at 91 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4466. The term "substantial threat of a discharge" also is used throughout Title I of OPA 90 and the FWPCA (but notably *not* in Title 46, U.S.C., where federal prevention programs reside), securing it firmly to liability and response to an "incident."[26] As referenced by the report accompanying S. 686, the bill "deals only with discharges or significant threats of discharge that require a response or that cause damages." S. Rep. No. 101-94, 101st Cong., 2d Sess. at 11, *reprinted in* 1990 U.S.C.C.A.N. 722, 732-33 (1990).[27]

Whereas Intertanko has argued that the non-preemptive impact of OPA section 1018 is confined to Title I of OPA ("Liability and Compensation"), the United States has offered the broader observation that section 1018's impact, at its maximum, can be measured by the "Nothing in this Act" introductory clause. U.S. Br. at 44-45. The United States notes

26. An "incident" is "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the *discharge* or *substantial threat of discharge* of oil." 33 U.S.C. § 2701(14) (emphasis added).

27. "Substantial threat of a discharge" also appears in numerous FWPCA and OPA 90 implementing regulations. *See* 15 C.F.R. § 990.30 (natural resource damages); 33 C.F.R. §§ 136.1 and 138.20 (financial responsibility); 33 C.F.R. pts. 154 and 155 and 40 C.F.R. pts. 112 and 300 (response plans); and 33 C.F.R. § 158.170 (suspension of permits), as well as in several state statutes. "Substantial threat of a release" is a term used in CERCLA (42 U.S.C. §§ 9604, 9622) and its implementing hazardous waste response regulations (29 C.F.R. pts. 300 and 307), as well as several state statutes. In none of these laws or regulations does the term "substantial threat" connote a vessel or facility operating routinely, the context presented here.

that the federal laws relied upon by Intertanko and the United States are not OPA (*i.e.*, "this Act"), but the PWSA and later treaties and enactments amplifying PWSA safety and environmental protection provisions. Although this concept is somewhat broader than Intertanko's interpretation of OPA 90 section 1018, it leads to the same conclusion. The response briefs of the State and its supporters do not address this argument. Congress, in enacting OPA, consolidated a number of similar liability and financial requirement provisions from pre-existing statutes, many of which, like OPA's section 1018, have application to non-maritime facilities, and made clear through the language of section 1018 that it was doing nothing to alter pre-existing powers of the state, local and federal governments.

B. The Legislative History Of Section 1018 Does Not Support Expansive Application Of Its Non-Preemption Provisions To Vessel Operations, Personnel Qualifications and Training

The State and Respondent-Intervenors point to purported confirmations of non-preemptive intent in Senate Reports that accompanied the provision that became OPA section 1018. State Br. at 35-36; and Respondent-Intervenors Br. at 26-29. The liability and compensation context of these statements confines their interpretative value to Intertanko's position that section 1018 preserves state, local and federal authority over liability and compensation that pre-dated OPA 90.[28]

28. The State offers up language of the Senate Report accompanying S. 686 that contains the phrase "no aspect of state oil spill programs is preempted." State Br. at 28. The "programs" discussed in that report are limited to liability, compensation funds, penalties, and financial responsibility. S. Rep. No. 101-94, *reprinted in* 1989 U.S.C.C.A.N. at 727-29. The State levitates this quotation out of a section that discussed existing penalty laws and the non-applicability of the 1851 Limitation of Liability Act, *see id.* at 739-40, one of the four acts specifically mentioned in section 1018. Additional language from the same report provides essential context: "S. 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fee, taxes, or penalties used to contribute to such funds." S. Rep. No. 101-94, *reprinted in* 1989 U.S.C.C.A.N. at 740.

Not once in any of the House or Senate floor statements regarding final passage of OPA 90, including the numerous quotations found in the State's brief, is there a mention of expansion of state authority into vessel design, construction, operating, manning, training, equipment and safety. Constantly and consistently the terms "discharge," "oil spill," "liability," "compensation," "funds" and "clean-up" are used along with "preservation" of existing "State rights." Importantly, all discussion of states rights are limited to what eventually became Title I, "Liability and Compensation." If there were the slightest merit to the Respondents' claim that section 1018 injected the states into the realm of regulating vessel operations, one would expect to find at least one committee report passage or floor statement that addressed the dramatic legal and policy shift that the State advocates. The State has not identified an expression of any such sentiment. The PWSA and its later enacted descendants continue to be the controlling federal statutory scheme for regulating vessels, their operations, and their crews.

CONCLUSION

The decision of the Court of Appeals, to the extent it upheld Washington State regulations affecting tank vessels in the interstate and foreign commerce of the United States, should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),	No. 095-1096
Plaintiff,	[Stamp from Court]
vs.	COMPLAINT OF INTERTANKO FOR DECLARATORY RELIEF AND PERMANENT INJUNCTION AGAINST THE ENFORCEMENT OF CERTAIN STATUTES AND REGULATIONS OF THE STATE OF WASHINGTON PURPORTING TO REGULATE OPERATIONS, MANNING, AND EQUIPMENT OF TANK VESSELS IN INTERSTATE AND INTERNATIONAL COMMERCE
MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State Of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County, DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor Of Snohomish County; and NORMAN MALENG, Prosecutor of King County,	
Defendants	

Plaintiff for its complaint herein alleges as follows:

Nature of the Case

1. This is an action to declare unconstitutional, unlawful and void, and to enjoin the enforcement of, the following statutes and regulations of the State of Washington:

Statutes: Title 88, Chapter 88.46, sections 88.46.010(2), 88.46.010(3), and 88.46.040(3) of the Revised Code of Washington, to the extent these statutory provisions require the establishment of Washington state regulations purporting to govern operational, personnel, management, technological or other aspects of tanker operations in the interstate and foreign commerce of the United States that are governed by federal law or international treaty;

Regulations: The following provisions of Chapter 317-21 of the Washington Administrative Code, which purport to govern operations, personnel qualifications, management techniques and practices, on-board equipment requirements and other aspects of tanker operations in the interstate and foreign commerce of the United States that are governed by federal law or international treaty as set forth more fully below: Sections 317-21-060 (1) and (2); 317-21-130 (1) through (4); 317-21-200 (1) through (6); 317-21-205 (1) through (3); 317-21-210 (1) through (4); 317-21-215 (1) through (10); 317-21-220 (1) through (3); 317-21-225; 317-21-230 (1) through (5); 317-21-235 (1) through (7); 317-21-240 (1) and (2); 317-21-245 (1) through (3); 317-21-250 (1) and (2); 317-21-255 (1) and (2); and 317-21-260 (1) through (5); 317-21-265 (1) and (2); and 317-21-540 (1) through (5).

The foregoing statutes and regulations are part of the State of Washington's "Best Achievable Protection" plan, and are herein referred to collectively as the "BAP Regulations".

Jurisdiction and Venue

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331(a) and 1337(a). This is a civil action arising under the Constitution, laws and treaties of the United States, and specifically arising under Acts of Congress regulating commerce, navigation, and international affairs. This action presents an actual case or controversy appropriate for declaratory relief pursuant to 28 U.S.C. § 2201(a).

3. Venue of this action properly lies in this Court pursuant to 28 U.S.C. § 1391(b). The defendants reside in the Western District of Washington, the events that gave rise to this action arose in this district, and the actions of defendants to be enjoined would otherwise occur in this district.

Parties

4. Plaintiff INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (hereinafter, "INTERTANKO") is an unincorporated association of independent tanker owners based in Oslo, Norway. Other pertinent information regarding INTERTANKO is as follows:

a. INTERTANKO's members represent, on a tonnage basis, approximately eighty per cent (80%) of the world's independently owned (i.e. non-government-owned or oil company owned) self-propelled tank vessel ("tanker") fleet. INTERTANKO's members include owners and operators of U.S.-documented tankers and foreign documented tankers whose countries of documentation have entered into treaties and international agreements with the United States pertaining to tanker operations. Many INTERTANKO members own or operate tankers that currently call at ports in the State of Washington while engaged in interstate and foreign commerce on the navigable waters of the United States. These owners and operators are directly affected by the statutory and regulatory provisions that are the subject of this complaint. Other INTERTANKO members whose vessels do not presently call at Washington ports are also affected by the statutory and regulatory provisions that are the subject of this complaint, to the extent that these provisions constitute impermissible barriers to their use of Washington state ports even when vessels have complied with federal laws and international treaties.

b. One of INTERTANKO's principal purposes as an organization is to foster effective and uniform international standards for tanker operations and safety. To the extent that the State of Washington's statutory and regulatory provisions applicable to tanker operations differ from or are inconsistent with established U.S. and international standards, both INTERTANKO members and INTERTANKO itself are adversely affected.

c. As is set out more fully below, INTERTANKO's members are adversely affected by the State of Washington's statutory and regulatory provisions because tanker owners and operators are required to operate, man, manage, and equip their vessels in order to operate in the State of Washington in a manner different from requirements applicable in other states of the United States, and in other countries. This lack of uniformity represents a burden on and expense to INTERTANKO's members calling at Washington ports. Moreover, this lack of uniformity impairs federal superintendence of federal tanker manning, operational and safety standards and presents a threat to international maritime safety.

5. Defendant Mike Lowry is the Governor of the State of Washington. He is the chief executive officer of the State and is therefore responsible for implementation and enforcement of the State's laws.

6. Defendant Christine O Gregoire is the Attorney General of the State of Washington, and in such capacity is responsible for enforcing the State's laws, including the BAP Standards challenged herein.

7. Defendant Barbara J. Herman is the Administrator of the State of Washington Office of Marine Safety (hereinafter, "OMS"). The Office of Marine Safety was established pursuant to Revised Code of Washington (hereinafter R.C.W.) § 43.211.010 and is responsible for the development, implementation and enforcement of the challenged BAP Regulations.

8. Defendant David MacEachern is Prosecutor of Whatcom County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

9. Defendant David Needy is Prosecutor of Skagit County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

10. Defendant James Krider is Prosecutor of Snohomish County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

11. Defendant Norman Maleng is Prosecutor of King County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

The Challenged Statute and Regulations

12. The BAP Regulations that are the subject of this complaint were issued pursuant to R.C.W. Chapter 88.46. This statute (R.C.W. §§ 88.46.010, *et seq.*) was enacted by the Washington State Legislature in 1991 and signed into law by Governor Booth Gardner on May 21, 1991. The statute became effective on July 1, 1991.

13. The statute contains various provisions requiring owners and operators of tank vessels to file oil spill prevention and response plans with OMS. Failure to file acceptable plans subjects violators to statutory penalties and a prohibition on calling at Washington ports. R.C.W. §§ 88.46.070; 88.46.080; 88.46.090.

14. R.C.W. § 88.46.040 (3), provides that OMS ". . . shall only approve a prevention plan if it provides the best achievable protection from damages caused by the discharge of oil into the waters of the state. . . ." Pursuant to R.C.W. §§ 88.46.010 (2) and 88.46.010(3), OMS is to define the term "Best Achievable Protection" by regulation. Section 88.46.040 (1) provides that "the office [i.e. OMS], by rule, shall establish standards for spill prevention plans."

15. Pursuant to the aforementioned statutory provisions, OMS issued interim regulations on November 24, 1992. Under Washington Administrative Code ("WAC") 317-20, these regulations became effective December 24, 1992. Amplifying regulations were issued on March 4, 1993, and became effective on April 4, 1993.

16. The current "best achievable protection" standards were adopted by OMS and promulgated as binding rules as part of WAC 317-21 on December 9, 1994. Under WAC 317-21-410, an oil spill prevention plan that meets the standards will be approved as best achievable protection of state waters and marine environments. Under WAC 317-21-500, an owner or operator of a tank vessel who fails to comply with the regulations is subject to the following administrative actions: (1) plan disapproval; (2) restriction of the tank vessel's movements or operations in state waters, or both; (3) assessment of civil penalties under R.C.W. 88.46.090: (4) referral for prosecution under R.C.W. 88.46.080; or (5) denial of entry into state waters. This regulation also repealed the previous oil spill prevention plan requirements contained in WAC 317-20.

17. For the declared purpose of protecting state waters and shorelines from the danger of oil spills, the BAP Regulations impose substantial restrictions on the manning, training, operation and safety and equipage of oil tankers in Washington waters. WAC 317-21-060 defines "best achievable protection" and "best achievable technology". Examples of requirements are: WAC 317-21-130 requires owners and operators to submit a summary of events involving their vessels over the past five years and to report events after the submission of their Prevention Plan. WAC 317-21-200 mandates that a company's Prevention Plan include provisions that tanker crews: (1) make security rounds every two hours; (2) plot the vessel's position every hour while at anchor; and (3) man both the engine room and engine control room while maneuvering. WAC 317-21-205 requires a plan to include the following standards: (1) the taking of a vessel's position every 15 minutes while underway; (2) a requirement for comprehensive voyage planning; and (3) a requirement that navigation watches check the tanker's gyrocompass "frequently". WAC 317-21-210 requires that the plan to include requirements to: (1) inspect the steering gear room hourly; and (2) secure scoop injection cooling water systems. WAC 317-21-215 requires pre-arrival tests and inspections. WAC 317-21-220 imposes standards for emergency operating procedures. WAC 317-21-225 establishes state control over tanker navigation records. WAC 317-21-230 requires that a Prevention Plan establish a comprehensive training program covering orientation of new crew members, position-specific training, refresher training, and shipboard drills. WAC 317-21-235 imposes random, pre-employment, probable cause and post-accident drug and alcohol testing for

crewmembers. WAC 317-21-240 requires reviews of personnel performance. WAC 317-21-245 establishes work hour limits. WAC 317-21-250 requires that crewmembers use a common language. WAC 317-21-255 requires the maintenance of training and work hour records. WAC 317-21-260 requires owners and operators to establish: (1) a "Safety and Environmental Protection Management System"; (2) a quarterly vessel visitation program; (3) a preventive maintenance program; and (4) a critical area inspection program. WAC 317-21-265 requires all tankers to have on board: (1) Global Positioning System ("GPS") receivers; (2) radars and Automated Radar Plotting Aids; and (3) a marker buoy, pick-up gear, and a towing pennant at both ends of the tanker that are deployable in 15 minutes without electrical power. WAC 317-21-540 requires advance notice of vessel entry and safety reports.

Federal Statutes, Regulations and Treaties

18. The BAP Regulations invade a field of regulation that has been comprehensively occupied by federal statute, regulation, and treaties to which the United States is a party. The Government of the United States has undertaken comprehensive regulation of operations, manning, safety, training, equipage, design, and personnel qualifications with respect to oil tanker operations in interstate and foreign commerce.

19. Federal occupation of the relevant field is demonstrated by Subtitle II of Title 46, United States Code, Shipping (hereinafter "Title 46"), Pub. L. 98-89, 97 Stat. 500 (August 26, 1983), as amended; the Ports and Waterways Safety Act, as amended by the Port and Tanker Safety Act of 1978, Pub. L. 95-474, 92 Stat. 1471 (October 17, 1978); the Act to Prevent Pollution from Ships, Pub. L. 96-478, 94 Stat. 2298 (October 21, 1980), as amended; the Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 434 (August 18, 1990), and the International Regulations for Preventing Collisions at Sea, Pub. L. 95-75, 91 Stat. 308 (July 27, 1977), as amended. Federal laws and regulations promulgated under these statutes and others establish a comprehensive regulatory scheme for vessel design, equipment and navigational control, and thus embrace both the objectives and regulatory scheme of the BAP Regulations.

20. With respect to U.S.-documented tankers, the following federal statutes and treaties evidence occupation of the field by the federal government: Convention on the International Regulation for Preventing Collisions at Sea, 1972 (28 UST 3459, T.I.A.S. No. 8587); the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1978 (T.I.A.S.); the International Convention for the Safety of Life at Sea, 1974 (32 UST 47, T.I.A.S. No. 9700); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (T.I.A.S.); 33 U.S.C. § 1223, vessel operating requirements; 33 U.S.C. § 1227, investigatory powers; 33 U.S.C. § 1228, conditions for entry to ports in the United States; 33 U.S.C. §§ 1602 and 2005, lookouts; 33 U.S.C. §§ 1602 and 2019, conduct of vessels in restricted visibility; 33 U.S.C. Chapter 33, prevention of pollution from ships; 46 U.S.C. Chapter 37, carriage of liquid bulk dangerous cargoes; 46 U.S.C. § 3703, regulations; 46 U.S.C. § 3707, tanker minimum standards; 46 U.S.C. § 3708, self-propelled tank vessel minimum standards; 46 U.S.C. § 3714, inspection and examination; 46 U.S.C. § 3717, marine safety information system; 46 U.S.C. § 6101, marine casualties and reporting; 46 U.S.C. § 6102, state marine casualty reporting system; 46 U.S.C. § 6301, investigation of marine casualties; 46 U.S.C. Part E, merchant seamen licenses, certificates and documents; 46 U.S.C. § 7101, issuing and classifying licenses and certificates of registry; 46 U.S.C. § 7302,

issuing merchant mariners' documents and continuous discharge books; 46 U.S.C. Chapter 75, general procedures for licensing, certification, and documentation; 46 U.S.C. Chapter 77, suspension and revocation; 46 U.S.C. Part F, manning of vessels and watches; 46 U.S.C. § 8301, minimum number of licensed individuals; 46 U.S.C. § 8304, implementing the Officers' Competency Certificates Convention, 1936; 46 U.S.C. Chapter 85, pilots; 46 U.S.C. § 8702, certain crew requirements; 46 U.S.C. § 8703, tankermen on tank vessels; and 46 U.S.C. § 9102, standards for tank vessels of the United States.

21. With respect to foreign-documented tankers, the following federal statutes and treaties evidence federal occupation of the field: Convention on the International Regulations for Preventing Collisions at Sea, 1972 (28 UST 3459, T.I.A.S. No. 8587); the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (T.I.A.S.); the International Convention for the Safety of Life at Sea, 1974 (32 UST 47, T.I.A.S. NO. 9700); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (T.I.A.S.) (hereinafter referred to as "STCW"); 33 U.S.C. § 1223, vessel operating requirements; 33 U.S.C. § 1227, investigatory powers; 33 U.S.C. § 1228, conditions for entry to ports in the United States; 33 U.S.C. §§ 1602 and 2005, look-outs; 33 U.S.C. §§ 1602 and 2019, conduct of vessels in restricted visibility; 33 U.S.C. Chapter 33, prevention of pollution from ships; 46 U.S.C. Chapter 37, carriage of liquid bulk dangerous cargoes; 46 U.S.C. § 3703, regulations; 46 U.S.C. § 3707, tanker minimum standards; 46 U.S.C. § 3708, self-propelled tank vessel minimum standards; 46 U.S.C. § 3711, evidence of compliance by foreign vessels; 46 U.S. C. § 3714 , inspection and examination; 46 U.S.C. § 3717 marine safety information system; 46 U.S.C. § 6101, marine casualties and reporting; 46 U.S.C. § 6102, state marine casualty reporting system; 46 U.S.C. § 6301, investigation of marine casualties; 46 U.S.C. § 8304, implementing the Officers' Competency Certificates Convention, 1936; 46 U.S.C. Chapter 85, pilots; and 46 U.S.C. § 9101, standards for foreign tank vessels.

22. Pursuant to the foregoing statutes and conventions, the United States Coast Guard has, under authority delegated by the U.S. Secretary of Transportation, promulgated detailed regulations that implement Congressional mandates concerning operations, manning, safety, training, equipage, design, and personnel qualifications with respect to oil tanker operations in interstate and foreign commerce. These regulations are: 33 C.F.R. § 153.201 *et seq*., reporting of a discharge of oil or hazardous material; 33 C.F.R. § 155.205, discharge removal equipment for vessels 400 feet or greater in length; 33 C.F.R. § 155.235, emergency towing capability for oil tankers, 33 C.F.R. §§ 161.128 through 161.136 and §§ 161.227 through 161.236, vessel reporting requirements and vessel traffic system in Puget Sound and Straits of Juan de Fuca; 33 C.F.R. § 160.201 *et seq*., notifications of arrivals, departures, hazardous conditions and certain dangerous cargoes; 33 C.F.R. § 164.11, navigation underway, general; 33 C.F.R. § 164.13, navigation underway, tankers; 33 C.F.R § 164.19, requirements for vessels at anchor; 33 C.F.R. § 164.25, tests before entering port or getting underway; 33 C.F.R. § 164.35, equipment, all vessels including internal vessel communication; 33 C.F.R. § 164.37, equipment, vessels of 10,000 gross tons or more; 33 C.F.R. § 164.38, automatic radar plotting aids (ARPA); 33 C.F.R. § 164.39, steering gear for foreign tankers; 33 C.F.R. § 164.41 electronic position fixing devices; and 33 C.F.R. § 164.61, marine casualty reporting and record retention; 46 C.F.R. § 4.04-1, reports of potential vessel casualty; 46 C.F.R. § 4.05-1, notice of marine casualty; 46 C.F.R. § 4.05-12, alcohol or

drug use by individuals directly involved in casualties; 46 C.F.R. § 4.05-15, retention of voyage records; 46 C.F.R. § 4.06-1, responsibilities of the marine employer; 46 C.F.R. Part 10, licensing of maritime personnel; 46 C.F.R. Part 12, certification of seaman; 46 C.F.R. Part 15, manning requirements; 46 C.F.R. § 15.405, familiarity with vessel characteristics; 46 C.F.R. § 15.701, Officers Competency Certificates Convention, 1936; 46 C.F.R. § 15.705, watches; 46 C.F.R. § 15.710, working hours; 46 C.F.R. 15.730, language requirements; 46 C.F.R. § 15.850, lookouts; 46 C.F.R. Part 16, chemical testing; 46 C.F.R. § 16.207, conflicts with foreign laws; 46 C.F.R. § 16.210, pre-employment testing requirements; 46 C.F.R. § 16.220, periodic testing requirements; 46 C.F.R. § 16.230, random testing requirements; 46 C.F.R. § 16.240, serious marine incident testing requirements; 46 C.F.R. Subchapter B, Merchant Marine Officers and Seamen; 46 C.F.R. Subchapter D, tank vessels; 46 C.F.R. Subpart 30.30, interim procedures for evaluating vessel personnel licensing and certification programs of foreign countries; 46 C.F.R. § 32.15-30, radar requirements; 46 C.F.R. § 35.05-15, watchman for a tank vessel; 46 C.F.R. § 35.05-25, illness, alcohol, and drugs; 46 C.F.R. § 35.20-10, steering gear test; 46 C.F.R. § 35.20-20, master's and officer's responsibility; and 46 C.F.R. Subpart 58.25, steering gear.

23. Under international law, the country of registry of a vessel is responsible for adopting and enforcing laws to protect the welfare of the crew and passengers aboard a ship and to maintain good order thereon, and for ensuring that activities aboard the ship do not endanger other ships or the marine environment. This responsibility continues at all times, wherever the ship is located. Article 94 of the International Convention on the Law of the Sea requires flag states to take such measures as are necessary to ensure safety at sea with regard to (i) the construction, equipment and seaworthiness of ships; (ii) the manning of ships, labor conditions, and the training of crews; (iii) the use of signals, the maintenance of communications and the prevention of collisions; and (iv) the qualifications of the ships' masters and their officers. The flag state (*i.e.*, the nation under whose flag the vessel operates) has the primary obligation to ensure that its ships respect generally accepted international anti-pollution rules and standards and that they comply with domestic laws and regulations. A country of registry is also obligated to prohibit its ships from sailing unless they have complied with such international rules and standards, and have also met the flag state's own law, especially those related to design, construction, equipment and manning of ships. "Other states must accept the certificates issued by the flag state as evidence of the condition of the ship, unless there are clear grounds for believing that the condition of the ship does not correspond substantially to the certificates." Art. 217(1)-(3), International Convention on the Law of the Sea ("UNCLOS").

24. The United States has entered into a series of bilateral treaties which provide vessels of either contracting party to have liberty, on equal terms with vessels of the other party, to trade to all ports, places and waters of the other party open to foreign commerce and navigation.

25. The Washington State OMS has issued a publication entitled "Model Oil Spill Prevention for Tankers" that expressly identifies differences between the new BAP Regulations and the applicable federal and international standards. This publication expressly acknowledges distinctions between the BAP Regulations and established federal and international standards.

26. The establishment of standards governing the operations, manning, safety, training, equipment

requirements, and personnel qualifications of persons or entities operating tankers in the interstate and foreign commerce of the United States vitally affects a phase of interstate and foreign commerce in which national uniformity is essential and which therefore demands exclusive federal regulation.

27. By purporting to establish separate and distinct state requirements in these areas through the BAP Regulations, authorities of the State of Washington and OMS have unlawfully impinged upon federal power to regulate interstate and foreign commerce and foreign affairs, have impaired federal superintendence of these areas, and have imposed an undue burden upon such commerce.

28. Economical and safe use of tankers requires the flexibility for each tank vessel to serve many ports. The BAP Regulations, alone or in conjunction with differing requirements of other coastal states, will restrict the ports at which tankers can call without implementing special procedures or equipment requirements peculiar to the State of Washington and thereby prevent the efficient use of tankers.

29. To the extent that regulation of oil tankers imposes limitations on the use of the world's tanker fleet, such regulation is of significant concern to the principal maritime trading nations. Because of the international nature of tanker ownership, operation, and trading patterns, the regulation of tanker design, equipage, manning, personnel qualification and operations by international agreement has been deemed desirable, by the United States and other maritime nations.

30. Prevention of oil pollution by establishment of standards of tanker manning, personnel qualification, design, equipment and operation is also an issue of major international concern, as is evidenced by international agreements cited herein.

31. Additional requirements imposed by the BAP Regulations in the area of vessel design and construction and required safety and navigation equipment are in derogation of the international scheme to which the United States has subscribed, and are therefore invalid. The BAP Regulations, by prohibiting foreign documented oil tankers that comply fully with federal and international requirements from entering Washington waters or by penalizing such tankers for not meeting the additional requirements of the Washington law, constitute a refusal to recognize the certificate of the foreign government that the vessel is fit for the service in which it is engaged, and therefore conflict with the obligations of the United States under international conventions.

32. Unilateral action by authorities of the State of Washington purporting to impose standards of tanker design, manning, safety, personnel qualification, equipage, and operations substantially undermines the efforts of the federal government to secure international agreement on tanker regulation, and the bilateral treaties of free navigation, and thus infringes the treaty-making and foreign affairs powers of the federal government.

33. Through the BAP Regulations, authorities of the State of Washington purport to exercise jurisdiction beyond what is recognized by international law as permissible by a port or coastal state. The BAP Regulations clearly intrude upon areas specifically mandated to flag states' jurisdiction.

FIRST CAUSE OF ACTION

FOR DECLARATORY JUDGMENT

34. Plaintiff realleges and incorporate herein by reference the allegations set forth in paragraphs 1 through 33, as if fully set forth herein.

35. The validity and enforceability of the BAP Regulations create an actual controversy between Plaintiff and Defendants within the jurisdiction of this Court, which controversy may be determined by a judgment of this Court.

36. By reason of the Supremacy Clause of the Constitution of the United States of America (Article VI, Clause 2), the Commerce Clause (Article I, Section 8, Clause 3) and the Foreign Affairs Clause, (Article II, Section 2, Clause 2), the BAP Regulations are pre-empted by the federal statutes and international conventions cited above. This Court should therefore declare them unenforceable.

SECOND CAUSE OF ACTION

FOR PERMANENT INJUNCTION

37. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 36, as if fully set forth herein.

38. The BAP Regulations unlawfully interfere with federal and international regimes governing tank vessel operations and are pre-empted by the exclusive jurisdiction of the Government of the United States, and particularly the United States Coast Guard.

39. Unless the Defendants are enjoined from enforcing the BAP Regulations, plaintiffs will suffer immediate and irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this court for judgment as follows:

1. For a declaration that:

(a) the BAP Regulations are unconstitutional, void and unenforceable; and,

(b) defendants may not promulgate, implement or enforce the BAP Regulations because they are pre-empted by federal law.

2. For an injunction prohibiting defendants, their agents, and any person acting on their behalf, at their direction or under their control from taking any action to implement or enforce the BAP Regulations.

3. That plaintiff recover its costs and disbursements herein together with such other and further relief as the Court may deem just and proper.

DATED this 17th day of July, 1995. [Handwritten dates]

JAMESON BABBITT STITES & LOMBARD

By: S//
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